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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,
ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

Plaintiffs,

v.

TECK COMINCO ALASKA INCORPORATED

Defendant.

NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,

Intervenors-Defendants.

Case No. A04-49 (JWS)

DECLARATION OF LUKE COLE
IN SUPPORT OF REPLY IN
NORTHWEST ARCTIC
BOROUGH'S UNDISCLOSED
EXHIBITS AND MOTION *IN*
LIMINE TO EXCLUDE
EXHIBITS NOT
TIMELY DISCLOSED
(Fed. R. Civ. Proc. 26 and 37)

DECLARATION OF LUKE COLE IN SUPPORT OF
REPLY IN SUPPORT OF OBJECTION TO NORTHWEST
ARCTIC BOROUGH'S UNDISCLOSED EXHIBITS &
MOTION IN LIMINE TO EXCLUDE EXHIBITS

1 I, Luke Cole, declare:

2 1. I am over 18 years of age and not a party to this case. I am lead counsel for plaintiffs.

3 2. I was lead counsel for the plaintiffs in the suit *Kivalina Relocation Planning Committee*
4 *v. Teck Cominco Alaska Incorporated* (the “KRPC suit”). In the KRPC suit, the Borough did not
5 disclose any of the four exhibits it now offers at trial as part of its initial disclosures or supplemental
6 disclosures under Rule 26. I had no way to know what documents the Borough would rely on at
7 trial in that case.

8 3. Because of the large volume of discovery that had taken place between Teck Cominco
9 and the Kivalina Relocation Planning Committee in the KRPC suit, when the Adams plaintiffs filed
10 this suit all parties – the plaintiffs, Teck Cominco, NANA and the Borough – stipulated as to the use
11 of certain documents from that suit in this suit. That stipulation is filed at Docket 75 (and an
12 electronic version is filed at Docket 247-1). That stipulation is specific as to which documents from
13 the KRPC suit may be used as evidence as though discovered in this suit. The Borough’s attorney
14 signed the stipulation. Nowhere in that stipulation is there any mention of any Borough documents.

15 4. There was no way I could know that the Borough intended to rely on documents from the
16 KRPC suit that were not listed in the stipulation, which is the only agreement in this case expressly
17 governing the use of documents from the KRPC suit.

18 5. Adams moved to exclude the documents offered by the Borough as trial exhibits because
19 it is harmed by the Borough’s failure to timely disclose them. Adams is prejudiced by the
20 Borough’s failure to disclose the documents in a number of ways. First, the failure to disclose the
21 documents during the discovery period precluded Adams from doing any written discovery of the
22 Borough about the documents, such as requests for admission, requests for production, or
23 interrogatories to discover the background, reason for adoption, relevance or status of the proffered
24 documents. Second, the failure to disclose the documents during the discovery period precluded
25 Adams from deposing any Borough officials (or any other witness, for that matter) about their
26 contents, history, status and relevance, or lack thereof, to this case. Third, the failure to disclose the
27 documents during the discovery period precluded Adams from listing any documents it might have
28 discovered from the Borough that would contradict, supplement, explain or undercut the documents

1 offered by the Borough. Finally, the failure to disclose the documents during the discovery period
2 precluded Adams from securing and timely disclosing any witness(es) it might have chosen to use to
3 amplify, contradict or otherwise comment on the Borough's documents.

4 6. Because the discovery period is now long over, none of these harms are curable. It would
5 be impossible for Adams to do written discovery of the Borough, and then depositions following
6 that, followed up by further written discovery, as it has had the opportunity to do with Teck
7 Cominco in this case.

8 7. Plaintiffs' expert Randolph Fischer is testifying by deposition because, as an elected
9 member of the Colorado legislature, his schedule precludes him being in Alaska for trial this
10 summer.

11 I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th
12 day of February at San Francisco, California.

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14 /S/ Luke Cole
15 Luke Cole
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February 2008, a true and correct copy of the foregoing Declaration of Luke Cole in Support of Reply in Support of Objections to Northwest Arctic Borough's Exhibit List and Motion to Exclude Undisclosed Exhibits was served, via electronic mail, on the below identified parties of record:

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/s/ Luke Cole

Luke Cole